LIBRARY
SUPREME COURT, U. S.

No. 73-214

FILED
OCT 11 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHRIS CARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-214

CHRIS CARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count alleging a conspiracy from September 1970 to February 1971 to conceal, buy, and sell narcotics known to have been unlawfully imported, and on three substantive counts alleging unlawful sales of such drugs in violation of 21 U.S.C. (1964 ed.) 174, one in September and two in October 1970.[1] He was sentenced to five years' imprisonment on the conspiracy count and to concurrent five year sentences on each of the three substantive counts, the latter sentences to run consecutively to the sentence on the conspiracy count.

---

[1]Co-defendant Virgil Cimmino, who was also convicted of violation of the narcotics laws, unsuccessfully sought review by this Court on grounds different from those raised in the instant petition. *Cimmino* v. *United States*, No. 72-6972, certiorari denied, October 9, 1973.

The court of appeals affirmed the conspiracy conviction and one of the substantive convictions but reversed as to the other two substantive counts (Pet. App. 1-17).

Petitioner contends that it was error to admit hearsay declarations by other co-conspirators made after petitioner's participation in the conspiracy had allegedly ended, and that he was sentenced in violation of *United States* v. *Tucker*, 404 U.S. 443.

The facts set forth in the opinion below are not in dispute.

> The Government's evidence consisted primarily of testimony by two witnesses, Paul Moore, a law school student and paid informer for the Bureau of Narcotics, and Federal Narcotics Agent Saul Weinstein. According to their testimony, Moore and Weinstein conceived the idea that they might infiltrate certain groups which they believed to be dealing in the Chicago area narcotics traffic by posing as partners trying to establish a narcotics business in the various college communities. Pursuant to that plan on September 13, 1970 Moore asked Micelli, a fellow employee at a restaurant where Moore worked part-time, if Micelli could provide a source for the sale of hard drugs to Moore and an unnamed partner who wanted to get in the campus drug business. Micelli referred Moore to his nephew, Virgil Cimmino, who he said could take care of him.
>
> Subsequently on September 14, 1970 Moore went to Chris Cardi's house where he explained his plans to Cimmino and requested that Cimmino get certain prices on heroin and cocaine from his sources. A meeting between Cimmino, More and Weinstein was set for September 16. Cimmino failed to keep the ap-

> pointment. Moore located Cimmino at Cardi's home on September 19 and asked him why he had not met them. Cimmino responded by saying that his sources had been out of town. Another meeting was arranged for the following evening. Weinstein failed to make that meeting, and Moore and Cimmino arranged another for the following evening. Cimmino again failed to appear and this time both Moore and Weinstein went to Cardi's house to find Cimmino. When they arrived they found Cimmino and Cardi standing beside Cimmino's car talking together. Moore introduced Weinstein to Cimmino and the three discussed the plan to enter the narcotics business with Cimmino as the supplier. During this conversation, Cardi was leaning against Cimmino's car and also walking on the lawn. There is no evidence, however, that he took part in the discussion.
>
> Moore and Weinstein next met Cimmino in Elmwood Park, Illinois, where Cimmino gave them a bag which he said contained four ounces of heroin. In exchange Moore gave him $4,400. Upon testing the substance at a later time, Weinstein discovered that it was flour instead of heroin. Moore and Weinstein immediately began searching for Cimmino, but were unable to locate him. The next day they drove to Cardi's house * * *. [Pet. App. 2-3.]

Moore told petitioner he wanted to talk about Cimmino and said "Well, you know we are doing business with him buying stuff, * * * heroin," and that "[h]e burned us. He gave us four ounces of flour or something and took $4,400 last night for it." Petitioner responded, "If it was anybody but you, I wouldn't talk to you about the stuff. But I will check into it and do whatever can be done. * * * You'll get it" (Pet. App. 11).

> Two hours later Cimmino reached Moore by phone, saying: "Are you trying to get me killed? * * * You're going to get your stuff. Dickie [Cardi's nickname] is on my back. He slapped me around and I lost my job collecting. I had five or six stops and I was making $150 a week." Weinstein demanded that Cimmino produce real heroin or return the money. The next day Cimmino met Moore and Weinstein and gave them four ounces of heroin.[Pet. App. 3-4.]

The government presented evidence of two additional sales of narcotics by Cimmino to the government agents, one on October 1, 1970, and a second on October 15, 1970.[2] On November 28, 1970, three days after a meeting of petitioner, Cimmino and Micelli at petitioner's home (Pet. App. 7), Moore tape-recorded a telephone conversation initiated by Cimmino which contained various references to "D.C." and "Dickie" (apparently petitioner) and which also referred to Cimmino's and Moore's involvement in narcotics transactions.[3] Cimmino and Moore both testified at the trial and were cross-examined by petitioner.

1. The petition does not challenge the sufficiency of the evidence to support the conspiracy conviction or the substantive conviction based on the September 25 sale, nor does it in fact raise any constitutional

---

[2]Petitioner's convictions on the substantive counts for these two sales were reversed on appeal due to insufficient evidence that he was involved in the sales.

[3]The recording is set forth in pertinent part in the opinion below (Pet. App. 4, n. 2).

question.[4] Rather, petitioner claims that the tape-recorded conversation was technically hearsay erroneously admitted against him, so that both convictions should be reversed, despite the facts that (1) both parties to the taped conversation testified and were cross-examined by petitioner, (2) no suggestion is made that the tape or the statements on it were inaccurate, and (3) petitioner does not contend that the taped conversation incriminated him (Pet. 12).

Admission of the tape was not contrary to *Lutwak* v. *United States,* 344 U.S. 604, 618; *Krulewitch* v. *United States,* 336 U.S. 440, 444; and *Fiswick* v. *United States,* 329 U.S. 211, 217, which hold that out-of-court hearsay declarations made by one co-conspirator after the termination of a conspiracy and not in furtherance of its objectives are not admissible against other co-conspirators. Here, the conspiracy to sell narcotics had been established; it had not been terminated; and the conversation was plainly in furtherance of the objectives of the agreement, *i.e.,* the sale of narcotics. Moreover, the only evidence indicating that petitioner had withdrawn from the conspiracy

---

[4]Although petitioner asserts that the admission of the tape violated his Sixth Amendment right to confrontation (Pet. 2, 8, 10), it is clear that the petition raises, at best, only a question concerning non-constitutional rules of evidence, because both parties to the taped conversation testified at the trial and were cross-examined by petitioner. Compare *Nelson* v. *O'Neil,* 402 U.S. 622.

[5]The statement of the court of appeals (Pet. App. 14) that so far as petitioner was concerned the conspiracy ended on September 25, 1970, was directed at the question of his liability under the substantive counts based on later transactions in which he was not shown to be directly involved. That statement does not indicate that the court concluded that petitioner had so withdrawn from the conspiracy as to avoid any responsibility for the acts and declarations of his confederates, nor that they had known from the outset that his participation would be limited to a single transaction.

was the tape-recorded statement of Cimmino to the effect that, while petitioner did not object to Cimmino's sales, he did not want to appear to be associated with them (Pet. App. 14). Since both a conspiracy and petitioner's participation in it were established, the burden was on petitioner affirmatively to show his withdrawal.[5] *Hyde* v. *United States*, 225 U.S. 347, 369-370; *United States* v. *Chester*, 407 F. 2d 53, 55 (C.A. 3), certiorari denied, 394 U.S. 1020; *United States* v. *Goldberg*, 401 F. 2d 644, 648 (C.A. 2), certiorari denied, 393 U.S. 1099. As no such showing was made, the recorded statements were admissible against petitioner as a member of the ongoing conspiracy.[6]

Even if the admission of the recording was technically erroneous, it was not so prejudicial as to require reversal. In large part the tape exculpated petitioner.[7] He does not contend that the balance of the statements were inculpatory as such (Pet. 12). Rather, they dealt with matters that had already been attested to by government witnesses on direct examination

---

[6]Moreover, even if petitioner had ceased to participate in the conspiracy prior to the recorded conversation on November 28, 1970, such withdrawal would not have been legally effective or complete until it had been communicated to the other co-conspirators, and the statements of Cimmino, as petitioner's agent in communicating his withdrawal, would have been admissible against petitioner. *United States* v. *Geaney*, 417 F. 2d 1116, 1121 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028.

[7]It was due, *inter alia*, to the exculpatory nature of the recorded statements that the court below reversed petitioner's convictions as to the substantive sales on October 1 and 15 (Pet. App. 14).

(Pet. 11), and were merely cumulative.[8] Thus, admission of the recorded conversation would have been harmless error.

2. Invoking *United States* v. *Tucker*, 404 U.S. 443, petitioner contends that he should be resentenced because the substantive convictions reversed on appeal might have influenced the sentences on the other two counts. Here, however, petitioner's sentence was not based on any unconstitutional defect,[9] nor had there been any wrongful incarceration of him which might have been taken into account by the sentencing judge, as in *Tucker*. Rather, the court considered the evidence of petitioner's role in the criminal endeavor and imposed sentence accordingly (Pet. App. 19). A resentencing is not required by *Tucker* whenever one count of a multi-count conviction is invalidated,[10] see *United States* v. *Driscoll*, 449 F. 2d 894 (C.A. 1), certiorari denied, 405 U.S. 920, and the sentencing judge may properly consider evidence introduced on counts as to which the defendant was acquitted. *United*

---

[8]Petitioner's claim of prejudice comes down to the assertions (1) that evidence of petitioner's words consisted entirely of the government agents' testimony that he said "you'll get it" (Pet. 11), which comment was in petitioner's view "suspiciously absent" from the agents' prior written reports (Pet. 7), and (2) that the tape served to corroborate the testimony of the agents. In fact, the words "you'll get it" added little to petitioner's statement—also testified to by the agents without challenge and included in their reports—upon hearing of Cimmino's delivery of flour instead of heroin, that "I will check into it and do whatever can be done about the stuff [*i.e.*, heroin]" (Pet. App. 3), and the fact that the next day Cimmino delivered the heroin to the agents.

[9]See note 4, *supra*, p. 5.

[10]Significantly, in his petition for rehearing, which the court of appeals denied, petitioner did not contend that the resentencing he sought was required by *Tucker*.

States v. *Sweig*, 454 F. 2d 181, 184 (C.A. 2). Moreover, since petitioner received concurrent sentences on each of the three substantive counts, reversal as to two of the counts does not require resentencing.[11]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

---

[11]Petitioner's reliance on *McGee* v. *United States*, 462 F. 2d 243 (C.A. 2), is misplaced for there a divided court of appeals reversed a denial of a motion to reduce sentence under Rule 35, Fed. R. Crim. P., and remanded for reconsideration, only on proof that the remaining charges for violations of the Selective Service laws would as a matter of policy probably not have been prosecuted absent the charge of failure to submit to induction on which a conviction was reversed. No such governmental policy is present here. This case is rather more like those described in *McGee* where resentencing would typically not be required, *e.g.*, conspiracy count conviction affirmed and substantive count conviction reversed. *Id.* at 246, n. 5.